

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

PROTECT THE PENINSULA'S FUTURE
AND WASHINGTON ENVIRONMENTAL
COUNCIL

Case Nos. 00-2-0008 and 01-2-0020

ORDER ON MOTION TO DISMISS

Petitioners,

v.

CLALLAM COUNTY,

Respondent.

This matter comes before the Board pursuant to a Motion to Dismiss filed by Clallam County (County).¹ Protect the Peninsula's Future (PPF) filed a response on October 22, 2012.² The Washington Environmental Council was not a party to the motion. Oral argument on the motion took place telephonically on December 3, 2012. The County was represented by George A. Kresovich and Gerald Steel represented PPF. Board members Nina Carter, Chuck Mosher and William Roehl were present with Mr. Roehl presiding.

I. BACKGROUND

These two consolidated cases have a lengthy history, one which began in 1999. Clallam County adopted a critical areas ordinance on December 28, 1999 leading to the filing of a Petition for Review (PFR) (Case No. 00-2-0008). The Board's December 19, 2000 Final Decision and Order (FDO) found parts of the challenged ordinance failed to comply with the GMA and imposed invalidity. Subsequent County legislation intended to achieve compliance led to the filing of a second PFR (Case No. 01-2-0020). The two cases were consolidated.

¹ Clallam County's Motion to Dismiss and to Rescind the Order of Invalidity, filed September 25, 2012

² PPF Response to the County Motion to Lift Invalidity and Dismiss

1 An October 26, 2001 Compliance Order/FDO (CO/FDO) referenced 6 instances³ which the
2 Board had previously found substantially interfered with GMA goals (and which
3 consequently served as the basis for imposing invalidity):
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- 5 1. The exemption of coverage for Type 5 waters of less than 500 feet;
- 6 2. Buffer widths for minor new development in Type 2-5 waters;
- 7 3. Buffer widths for Type I waters in the Natural, Conservancy, and Rural designated
8 areas under the SMP;
- 9 4. Allowance of a 25 foot buffer averaging under CCC 27.12.734 for minor new
10 development in Type 4 and 5 waters;
- 11 5. Reduced buffers for Type 1 waters under the urban and suburban designations
12 found in the SMP; and
- 13 6. Allowance of reduced critical area (CA) protection for all properties enrolled in the
14 open space taxation program found in RCW 84.34.⁴

15 The County appealed the October 26, 2001 CO/FDO to the Clallam County Superior Court.
16 That court's ruling was in turn appealed to the Court of Appeals, Division II, which issued its
17 decision on October 25, 2005, a decision which included a remand to the Board to address
18 compliance.

19 The Board subsequently issued an Order Finding Partial Compliance on January 27, 2006.
20 That order noted the parties had stipulated to compliance on the first three matters
21 referenced above, and that the Board had been reversed regarding numbers 4 and 5. Item
22 6 was thus the only remaining GMA issue before the Board.⁵
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25 ³ Compliance Order, Case No. 01-2-0020; Final Decision and Order, Case No. 00-2-0008 at 7.

26 ⁴ "In the FDO we found that the County's exemption of CA protections from pre-existing and ongoing
27 agriculture throughout the County did not comply and substantially interfered with the goals of the Act. In
28 response, Clallam County rejected limiting reduced CA protections to only designated resource land (RL)
29 areas and allowed the reduced protection to apply to all existing agricultural uses in any zone that were in
30 existence as of 1992 (the date of adoption of the original CAO) and that were also enrolled in the open space
31 taxation program found in RCW 84.34." *Id.* at 5

32 ⁵ Order Finding Parcel Compliance, January 27, 2006, at 3: "The Board's decision finding that CCC
27.12.035(7) is non-compliant and invalid was reversed by the Superior Court, but the Court of Appeals,
Division II, affirmed the decision in part, reversed it in part, and remanded it for further proceedings before the
Board. *Protect the Peninsula's Future v. Clallam County*, Docket No. 31283-2-II, October 25, 2005. [*Clallam
County v. Hearings Bd.*, 130 Wn. App. 127]. The County has filed a petition for review with the Washington
Supreme Court and expects a decision on that petition within the next 4 to 5 months." [the Supreme Court
denied review].

1 As to Item 6, the Court of Appeals decision held the Board erred when it decided that the
2 County's CA exemption must be limited to designated agricultural resource lands rather
3 than to all lands enrolled in the Open Space Taxation program. In remanding to the Board,
4 the Court stated:

5
6 This is not to say that the Board must approve the County's current exemption
7 plan. If the County, to meet its local conditions, wants to exempt a number of
8 small farms, it must then show that by using best available science it has
9 tailored the exemption to reasonably ameliorate potential harm to the
10 environment and fish and wildlife. And the regulations must specifically address
11 any threatened harm peculiar to the number and size of farms exempted. If the
12 Board finds that the County has not met this burden, on remand the County
may either reduce the amount of exempt land or more strictly control the more
broadly exempted land.

13 Clallam County v. Hearings Bd., 130 Wn. App. 127, 140 (2005)

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15 The Board also noted in its January, 2006 order that the County had filed a petition for
16 review with the Washington Supreme Court. It then went on to state it would not set a
17 compliance schedule pending a decision by the Supreme Court on the petition for review, a
18 petition which was ultimately denied. Prior to the Supreme Court's denial of the County's
19 petition for review, the legislature adopted SSB 5248 which suspended jurisdictions' powers
20 to amend or adopt critical areas ordinances as they applied to agricultural activities (and
21 referred the agriculture/critical area dispute to the Ruckelshaus Center for resolution).
22 Subsequent legislation further extended that preclusion. Thereafter, in 2011 the legislature
23 adopted ESHB 1886, the Voluntary Stewardship Program (VSP), codified as RCW
24 36.70A.700 through RCW 36.70A.760, together with amendments of RCW 36.70A.130 and
25 RCW 36.70A.280. Counties which wished to participate in the VSP were required to so
26 indicate by January 22, 2012.⁶ Counties which did not choose to participate in the VSP
27 remain subject to the RCW 36.70A.060 requirement to protect critical areas through the
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⁶ RCW 36.70A.710(1)(b).

1 adoption of development regulations.⁷ Clallam County did not elect to participate in the
2 VSP.⁸

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4 After the lengthy appeal and SSB 5248 hiatus, this matter returned to the attention of the
5 Board when PPF filed a motion to set a new compliance date.⁹ Compliance is due by
6 January 24, 2013 with a compliance hearing scheduled for March 26, 2013.
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8 **II. PRELIMINARY MATTERS**

9 At commencement of argument on the County's motion, PPF requested that the full panel
10 consider PPF's prior motion to take notice of certain facts and to supplement the record.
11 The request involved portions of PPF's proposed Exhibits 1031 and 1033 as well as
12 Exhibits 1027-1030 and 1039. The Board took the request under advisement and, following
13 deliberation, denies the request. WAC 242-03-530 grants the presiding officer the duty to
14 rule on evidentiary matters and such a ruling was made in the Order on Motion to
15 Supplement dated November 13, 2012. Furthermore, PPF's request amounts to a motion
16 for reconsideration. Such motions are only authorized in regard to final orders of the
17 Board.¹⁰
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20 **III. ISSUE TO BE DECIDED**

21 Whether to grant the County's motion to dismiss, the effect of which would necessarily
22 rescind the order of invalidity and, if that motion were to be denied, whether to lift invalidity.
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24 **IV. DISCUSSION AND ANALYSIS**

25 The County's Motion to Dismiss is grounded in the VSP, a program which established an
26 alternative method for counties to comply with the GMA's requirement¹¹ to protect critical
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30 ⁷ RCW 36.70A.710(1)(a): "As an alternative to protecting critical areas in areas used for agricultural activities
31 through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may
32 elect to protect critical areas through the program [the VSP]. "

⁸ Exhibit 1033, p. 4.

⁹ Motion to Set New Compliance Date, filed July 23, 2012.

¹⁰ WAC 242-03-830.

¹¹ RCW 36.70A.060.

1 areas in areas used for agricultural activities.¹² As stated by the County: "If a county does
2 not or cannot comply with the requirements for gaining approval of or implementing that
3 program [the VSP], then the legislature established four options for such a county to comply
4 with the GMA's requirements to protect critical areas."¹³

5
6 Those options are set out in RCW 36.70A.735 (emphasis added):

7 (1) Within eighteen months after one of the events in subsection (2) of this
8 section, a county must:

9
10 (a) Develop, adopt, and implement a watershed work plan approved by the
11 department that protects critical areas in areas used for agricultural activities
12 while maintaining the viability of agriculture in the watershed. The department
13 shall consult with the departments of agriculture, ecology, and fish and wildlife
14 and the commission, and other relevant state agencies before approving or
15 disapproving the proposed work plan. The appeal of the department's decision
16 under this subsection is subject to appeal under RCW 36.70A.280;

17 **(b) Adopt development regulations previously adopted under this chapter**
18 **by another local government for the purpose of protecting critical areas in**
19 **areas used for agricultural activities. Regulations adopted under this**
20 **subsection (1)(b) must be from a region with similar agricultural activities,**
21 **geography, and geology and must: (i) Be from Clallam, Clark, King, or**
22 **Whatcom counties; or (ii) have been upheld by a growth management hearings**
23 **board or court after July 1, 2011, where the board or court determined that the**
24 **provisions adequately protected critical areas functions and values in areas**
25 **used for agricultural activities;**

26 (c) Adopt development regulations certified by the department as protective of
27 critical areas in areas used for agricultural activities as required by this chapter.
28 The county may submit existing or amended regulations for certification. The
29 department must make its decision on whether to certify the development
30 regulations within ninety days after the county submits its request. If the
31 department denies the certification, the county shall take an action under (a),
32 (b), or (d) of this subsection. The department must consult with the departments
of agriculture, ecology, and fish and wildlife and the commission before making
a certification under this section. The appeal of the department's decision under

¹² RCW 36.70A.710(1)(a): "As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program."

¹³ Clallam County's Motion to Dismiss and to Rescind the Order of Invalidity at 5.

1 this subsection (1)(c) is subject to appeal under RCW 36.70A.280; or

2 (d) Review and, if necessary, revise development regulations adopted under
3 this chapter to protect critical areas as they relate to agricultural activities.

4
5 The County focuses on the RCW 36.70A.735(1)(b) option which provides counties may
6 achieve GMA compliance with the requirement to protect critical areas in areas used for
7 agricultural activities by adopting regulations from one of the four listed counties. As Clallam
8 County is one of the four, it takes the position the legislature determined Clallam County
9 regulations are compliant with the GMA.¹⁴

10
11 PPF argues the VSP does not establish a means of compliance with RCW 36.70A.060.¹⁵
12 Rather, it provides an alternative method for the protection of critical areas in areas used for
13 agriculture. RCW 36.70A.060 and the VSP are two separate paths and the VSP provisions
14 may not be used to satisfy the RCW 36.70A.060 requirements. PPF observes Clallam
15 County did not opt in to the VSP and therefore remains subject to RCW 36.70A.060, and
16 that the Board has previously ruled Clallam County Code 27.12.035(7) does not comply with
17 that statute and imposed invalidity.¹⁶ It argues RCW 36.70A.735(1)(b), the statute upon
18 which the County relies, does not apply to Clallam County due to the fact it did not opt in to
19 the VSP.
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22 PPF argues there is but one way to interpret RCW 36.70A.735. That is, a county is subject
23 to that statute only if it has opted in to the VSP and then any one of three things occurs: 1.)
24 the county fails to obtain approval for its proposed work plan (RCW 36.70A.735(2)(a); 2.)
25 the county fails to meet an approved work plan's goals and benchmarks (RCW
26 36.70A.735(2)(b)); or 3.) inadequate funding is received to implement the program (RCW
27 36.70A.735(2)(c) & (d)).
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31 ¹⁴ Motion to Rescind Order of Invalidity at 6,

32 ¹⁵ RCW 36.70A.060(2): "Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170."

¹⁶ PPF Response to the County Motion at 7, referencing both the December 19, 2000 FDO, and the October 16, 2001 FDO/CO.

1 Consequently, PPF asserts the options laid out in RCW 36.70A.735(1) are available only to
2 those counties whose work plans were not approved, failed to meet goals or whose efforts
3 were inadequately funded. Clallam County is not one of those counties. PPF presents a
4 logical statutory interpretation.

5
6 On the other hand, the County's argument that the legislature's adoption of RCW
7 36.70A.735(1)(b) with the inclusion of Clallam County as one of the four "safe harbor"
8 counties is more compelling. RCW 36.70A.735(1) establishes "fall back" alternatives for
9 counties when their VSP work plans are not approved, fail or are unfunded. When that
10 occurs, those "fall back" provisions require the county to adopt development regulations to
11 protect critical areas, just as RCW 36.70A.060 does. RCW 36.70A.735(1)(b), one of the
12 alternatives, allows counties to adopt previously adopted development regulations of one of
13 four counties: Clark, King, Whatcom, and Clallam.¹⁷ A county with similar agricultural
14 activities, geography, and geology to one of the four named counties, and which is unable to
15 complete its voluntary stewardship program, may simply adopt the development regulations
16 of one of those counties thereby satisfying the GMA requirement to protect critical areas.
17 Clearly, the legislature concluded the development regulations of those four counties were
18 sufficiently protective of critical areas in areas used for agriculture.

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22 Furthermore, the Board observes the position advanced by PPF could potentially produce
23 an absurd result. For example, a county with similar agricultural activities, geography and
24 geology to that of Clallam County and which elected to opt in to the VSP could conceivably
25 adopt Clallam County's existing development regulations. Those development regulations
26 would be deemed to adequately protect critical areas in areas used for agricultural activities
27 and thus be GMA compliant. On the other hand, the identical development regulations
28 adopted by Clallam County would not be sufficient to protect such critical areas and would
29 fail to comply with the GMA.
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32 ¹⁷ Clallam County was included as one of the four counties notwithstanding the fact the Board, in this case,
had determined its development regulations were non-compliant with the GMA and subjected them to an order
of invalidity.

1 One of the roles of the Growth Management Hearings Board in interpreting the GMA is to
2 give effect to legislative intent and avoid unlikely or absurd results.¹⁸ While the VSP
3 statutory framework now before the Board is less than clearly drafted, the Board concludes
4 the interpretation advanced by the County is the appropriate one.
5

6 7 V. ORDER

8 Based on the foregoing, the briefing and arguments of the parties, and having deliberated
9 on the matter, the Board grants Clallam County's Motion to Dismiss. Dismissal serves also
10 to rescind the order of invalidity. This case is closed.
11

12 Dated this 13th day of December, 2012
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15 _____
William Roehl, Board Member

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17 _____
Nina Carter, Board Member

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Chuck Mosher, Board Member
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23 **Note: This is a final decision and order of the Growth Management Hearings Board**
24 **issued pursuant to RCW 36.70A.300.¹⁹**
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26 _____
27 ¹⁸ *Kennewick v. Board For Firefighters*, 85 Wn. App. 366, 369:

28 The court, in interpreting a statute, must give effect to the Legislature's intent and avoid unlikely or
29 absurd consequences.

30 *State v. Elgin*, 118 Wn.2d 551, 555 (citations omitted):

31 Our paramount duty in statutory interpretation is to give effect to the Legislature's intent. We avoid a
32 literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or
purpose of an enactment should prevail over the express but inept wording."

30 *FOSC v. Skagit County*, WWGMHB Case No. 95-2-0065c, Order Rescinding Invalidity, July 14, 1997:

31 Either is an absurd result. In interpreting the GMA, our role is to give effect to Legislative intent and
32 to avoid unlikely or absurd results.

¹⁹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

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CONCURRENCE

Although I concur with the result of this decision, I remain concerned Clallam County adopted development regulations that may not comply with the GMA. Obviously, the Board cannot ignore the 2011 Legislative action (ESHB 1886) which referenced Clallam County in the Voluntary Stewardship Program.²⁰ Nevertheless, I am concerned the Board was unable to determine whether Clallam County was in compliance. That determination would have been made at subsequent remand hearings the Board did not hold. The Board could not test the Court's remand parameters as shown here:²¹

This is not to say that the Board must approve the County's current exemption plan. If the County, to meet its local conditions, wants to exempt a number of small farms, ***it must then show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife.*** And the regulations must specifically ***address any threatened harm peculiar to the number and size of farms exempted.*** If the Board finds that the County has not met this burden, on remand the County may either reduce the amount of exempt land or more strictly control the more broadly exempted land. (emphasis added)

The Court's remand states the County may exempt some agricultural practices from critical area requirements, but in doing so the County must show it used Best Available Science (BAS) tailoring the exemption to ameliorate environmental harm. Without hearing from the

24 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.

25 It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

26 ²⁰ RCW 36.70A.735(1) (b) Adopt development regulations previously adopted under this chapter by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology and must: (i) Be from **Clallam**, Clark, King, or Whatcom counties; or (ii) have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities. (emphasis added)

27 ²¹ Order Finding Partial Compliance, January 27, 2006, at 3. The Board's decision finding that CCC 27.12.035(7) is non-compliant and invalid was reversed by the Superior Court, but the Court of Appeals, Division II, affirmed the decision in part, reversed it in part, and remanded it for further proceedings before the Board. *Protect the Peninsula's Future v. Clallam County*, Docket No. 31283-2-II, October 25, 2005. [*Clallam County v. Hearings Bd.*, 130 Wn. App. 127]

1 County whether it completed the BAS work and "tailored the exemption," the Board could
2 not determine GMA compliance. But for the 2011 Legislative action, the Board would have
3 been in a position to make that determination.
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Nina Carter, Board Member
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